Au Lai Chan & Anor v Malaysian Mosaics Sdn Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(A)-200–04 OF 2022 AND W-01(A)-201–04 OF 2022
YAACOB MD SAM, RAVINTHRAN AND MOHD NAZLAN JJCA
20 SEPTEMBER 2023

Civil Procedure — Judicial review — Application for — Judicial review against awards of Industrial Court — Industrial Court found genuine redundancy existed in company which necessitated dismissal of employees — High Court affirmed Industrial Court's awards — Whether real redundancy established — Whether company should provide alternative employment to dismissed employees — Whether court should interfere with findings of facts of Industrial Court

Labour Law — Employment — Redundancy — Industrial Court found genuine redundancy existed in company which necessitated dismissal of employees — High Court affirmed Industrial Court's awards — Whether real redundancy established — Whether company should provide alternative employment to dismissed employees — Whether court should interfere with findings of facts of Industrial Court

The present appeals were filed against the decision of the High Court in dismissing the appellants' judicial review application against three awards of the Industrial Court in relation to the termination of the appellants' employment by the first respondent. The appellants in Appeal 200 were Au Lai Chan and Lim Chwee Hoon whereas the appellant in Appeal 201 was Wong Meng Koon. At the time of dismissal, the positions held by the appellants were as followed: (a) Au Lai Chan was the Senior General Manager (Manufacturing and Operational Support) with a monthly salary of RM44,151; (b) Lim Chwee Hoon was the Administrative Executive with a monthly salary of RM8,105; and (c) Wong Meng Koon was the General Manager (Commercial) with a monthly salary of RM22,941. Based on the termination letters, the appellants' employments were terminated on the ground of redundancy. The appellants argued that there was no redundancy because their job functions continued to exist, but the first respondent redistributed them to other employees. The first respondent denied the appellants' argument and contended that the company was operating at a loss and, as a result, had to downsize by closing the company's Plant No 2. Following this, a comprehensive review of all departments and the roles of all employees, from senior management to administrative positions, was conducted to identify any positions that were surplus to the company's manpower requirement. In this regard, the appellants'

positions had become redundant when Au Lai Chan's job functions were assumed by the Chief Operating Officer of the company, Lim Chwee Hoon's duties were decentralised to the respective departments, and Wong Meng Koon's job functions were absorbed by his superior. The Industrial Court found that a genuine redundancy arose in the company because of the downsizing and reorganisation that was necessitated by the losses suffered by the company from the year 2017 onwards. The High Court affirmed the decision of the Industrial Court and adopted its reasoning. In the present appeal, the appellants submitted that the redistribution of the workload of the appellants and reorganisation alone would not suffice to establish real redundancy. In addition, the first respondent had to prove that it adopted a fair procedure and offered alternative employment to the dismissed employee.

Held, dismissing Appeal 200 with agreed costs of RM10,000 subject to allocatur, and dismissing Appeal 201 with agreed costs of RM50,000 subject to allocatur:

(1) The court was of the view that the finding of fact by the Industrial Court that that there was a downward trend in the market, problem with the yields and the resultant closure of one of the first respondent's plants which was affirmed by the High Court, did not warrant interference by the court. The finding of fact of the Industrial Court based on the financial statements and audited accounts was unassailable. The authenticity of these crucial documents, which must by law be signed off by the directors, was not impugned. In addition, no evidence was provided by Au Lai Chan in the Industrial Court to support her argument that the profit loss stated in the financial statements and the audited accounts were mere 'paper losses'. In the result, the evidence of the first respondent in respect of profits remained unrebutted (see paras 19–21).

(2) The court had no reason to interfere with the finding of facts by the Industrial Court in respect of the appellants' redundancy. In the present case, apart from the continuous decline in profits for various reasons and the ensuing reorganisation of the company, manufacturing operations from the plants were reduced by 50%. As for the issue of whether the decision to close Plant No 2 was a correct decision, it was one that required business judgment and it was not for the court to usurp that function unless there was evidence of bad faith. In bad faith cases, it was possible to view the shutdown of a small operation as a colourable exercise of management prerogative to deliberately eliminate some employees. However, in the present case, considering the size of the plant that was closed down and the proven reasons such as declining profits due to market conditions and poor yields, the managerial decision could not be viewed with suspicion (see paras 32–33, 36, 38 & 41).

(3) There was no merit in the appellants' argument that the company should have looked for alternative positions for the dismissed employees. As was found by the Industrial Court, the appellants failed to identify the existence of suitable positions and that, in any event, returning to previous positions would amount to demotion, as conceded by them. Further, the appellants' counsel failed to point out any principle of law that stated that once redundancy was proved due to a valid restructuring or reorganisation, the employer was still obligated to look for alternative employment for the retrenched employee (see paras 39–40).

[Bahasa Malaysia summary

Rayuan-rayuan semasa difailkan terhadap keputusan Mahkamah Tinggi yang menolak permohonan semakan kehakiman perayu-perayu terhadap tiga award Mahkamah Perusahaan berhubung penamatan pekerjaan perayu-perayu oleh responden pertama. Perayu-perayu dalam Rayuan 200 ialah Au Lai Chan dan Lim Chwee Hoon manakala perayu dalam Rayuan 201 ialah Wong Meng Koon. Pada masa pemecatan, jawatan-jawatan yang disandang oleh perayu-perayu adalah seperti berikut: (a) Au Lai Chan ialah Pengurus Besar Kanan (Sokongan Pembuatan dan Operasi) dengan gaji bulanan RM44,151; (b) Lim Chwee Hoon adalah Eksekutif Pentadbiran dengan gaji bulanan RM8,105; dan (c) Wong Meng Koon ialah Pengurus Besar (Komersial) dengan gaji bulanan RM22,941. Berdasarkan surat-surat penamatan, pekerjaan perayu-perayu telah ditamatkan atas alasan lebihan guna tenaga. Perayu-perayu berhujah bahawa tiada lebihan guna tenaga kerana fungsi kerja mereka terus wujud, tetapi responden pertama mengagihkannya semula kepada pekerja-pekerja lain. Responden pertama menafikan hujah perayu dan berhujah bahawa syarikat beroperasi dalam kerugian dan, akibatnya, terpaksa mengecilkan saiz dengan menutup Loji No 2 syarikat. Berikutan itu, kajian menyeluruh semua jabatan dan peranan semua pekerja, daripada pengurusan kanan kepada jawatan pentadbiran, telah dijalankan untuk mengenal pasti apa-apa jawatan yang menjadi lebihan kepada keperluan tenaga kerja syarikat. Dalam hal ini, jawatan perayu-perayu telah menjadi lebihan apabila fungsi kerja Au Lai Chan disandang oleh Ketua Pegawai Operasi syarikat, tugas Lim Chwee Hoon didesentralisasikan kepada jabatan-jabatan yang terlibat, dan fungsi pekerjaan Wong Meng Koon diserap oleh pegawai atasannya. Mahkamah Perusahaan mendapati bahawa lebihan guna tenaga yang tulen telah timbul dalam syarikat kerana pengecilan saiz dan penyusunan semula yang diperlukan disebabkan oleh kerugian yang dialami oleh syarikat tersebut bermula tahun 2017 dan seterusnya. Mahkamah Tinggi mengesahkan keputusan Mahkamah Perusahaan dan menerima pakai alasan-alasannya. Dalam rayuan-rayuan ini, perayu-perayu berhujah bahawa pengagihan semula beban kerja perayu-perayu dan penyusunan semula sahaja tidak akan mencukupi untuk mewujudkan lebihan guna tenaga sebenar. Di samping itu, responden pertama perlu membuktikan bahawa ia mengamalkan prosedur

yang adil dan menawarkan pekerjaan alternatif kepada pekerja yang diberhentikan.

Diputuskan, menolak Rayuan 200 dengan kos yang dipersetujui sebanyak RM10,000 tertakluk kepada alokatur, dan menolak Rayuan 201 dengan kos yang dipersetujui sebanyak RM50,000 tertakluk kepada alokatur:

(1) Mahkamah berpendapat bahawa dapatan fakta oleh Mahkamah Perusahaan bahawa terdapat aliran menurun dalam pasaran, masalah dengan hasil dan akibatnya penutupan salah satu loji responden pertama yang disahkan oleh Mahkamah Tinggi, tidak mewajarkan campur tangan oleh mahkamah. Dapatan fakta Mahkamah Perusahaan tersebut berdasarkan penyata kewangan dan akaun yang telah diaudit tidak dapat dipertikaikan. Ketulenan dokumen-dokumen penting ini, yang mana berdasarkan undang-undang mesti ditandatangani oleh pengarah-pengarah, adalah tidak disangkal. Di samping itu, tiada keterangan diberikan oleh Au Lai Chan di Mahkamah Perusahaan untuk menyokong hujahnya bahawa kerugian keuntungan yang dinyatakan dalam penyata kewangan dan akaun yang diaudit adalah 'kerugian atas kertas' semata-mata. Hasilnya, keterangan responden pertama berkenaan dengan keuntungan kekal tidak disangkal (lihat perenggan 19–21).

(2) Mahkamah tidak mempunyai sebab untuk mengganggu dapatan fakta oleh Mahkamah Perusahaan berkenaan dengan lebihan guna tanaga perayu-perayu. Dalam kes ini, selain daripada kemerosotan berterusan dalam keuntungan atas pelbagai sebab dan penyusunan semula syarikat yang berikutnya, operasi pembuatan daripada loji tersebut telah dikurangkan sebanyak 50%. Berkenaan isu sama ada keputusan untuk menutup Loji No 2 tersebut adalah keputusan yang betul, ia adalah satu keputusan yang memerlukan 'business judgment' dan mahkamah tidak boleh merampas fungsi tersebut melainkan terdapat keterangan niat jahat. Dalam kes niat jahat, adalah mungkin untuk melihat penutupan operasi kecil sebagai pelaksanaan berwarna hak prerogatif pengurusan untuk memberhentikan beberapa pekerja dengan sengaja. Walau bagaimanapun, dalam kes ini, mengambil kira saiz loji tersebut yang telah ditutup dan sebab-sebab yang telah dibuktikan seperti kemerosotan keuntungan disebabkan oleh keadaan pasaran dan hasil yang lemah, keputusan pengurusan tidak boleh dilihat dengan syak wasangka (lihat perenggan 32–33, 36, 38 & 41).

(3) Tiada merit dalam hujahan perayu bahawa syarikat sepatutnya mencari jawatan alternatif untuk pekerja yang dibuang kerja. Seperti yang didapati oleh Mahkamah Perusahaan, perayu-perayu gagal untuk mengenal pasti kewujudan jawatan yang sesuai dan, dalam apa jua keadaan, pengembalian kepada jawatan terdahulu akan terjumlah kepada penurunan pangkat, seperti yang diakui oleh mereka.

Selanjutnya, peguam perayu-perayu gagal untuk menunjukkan mana-mana prinsip undang-undang yang menyatakan bahawa sebaik sahaja lebihan guna tenaga dibuktikan disebabkan oleh penstrukturan atau penyusunan semula yang sah, majikan masih bertanggungjawab untuk mencari pekerjaan alternatif untuk pekerja yang diberhentikan (lihat perenggan 39–40).]

Cases referred to

Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 MLJ 361, CA (distd)
Dynacraft Industries Sdn Bhd v Kamaruddin bin Kana Mohd Sharif & Ors [2012] 6 MLJ 453; [2012] 9 CLJ 21, FC (distd)
Nordson (M) Sdn Bhd v Lee Chin Tao & Anor [2012] 4 MLJ 565, CA (refd)
Saw Kong Beng v Mahkamah Perusahaan Malaysia & Anor [2016] MLJU 1222, HC (distd)
Stephen Bong v FCB (M) Sdn Bhd & Anor [1999] 3 MLJ 411, HC (refd)
Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc [1998] 5 MLJ 535; [1997] 1 LNS 99, HC (refd)
Woo Vain Chan v Malayawata Steel Bhd (currently known as Ann Joo Steel Bhd) [2016] 2 MLJ 848; [2016] 10 CLJ 176, CA (refd)
Wong Mei Yoke v Tien Wah Press (Malaya) Sdn Bhd [2018] 1 ILR 20, IC (distd)

Appeal from: Application for Judicial Review Nos WA-25–263–09 of 2020 and WA-25–265–09 of 2020 (High Court, Kuala Lumpur)

Shanker Subbramanian (with Juanita Louise Chua Ai Ling) (Shanker, Arjunan & Chua) for the appellants.
T Thavalingam (with Sebastian Tay) (T Thavalingam & Co) for the respondents.

Ravinthran JCA:

INTRODUCTION

[1] We heard two appeals (W-01(A)-200–04 of 2022 ('Appeal 200') and W-01(A)-201–04 of 2022 ('Appeal 201')) together. They originate from the decision of the High Court to dismiss judicial review applications against three awards of the Industrial Court. The appellants in Appeal 200 are Au Lai Chan and Lim Chwee Hoon whereas the appellant in Appeal 201 is Wong Meng Koon.

[2] The employment of the three appellants, along with more than 20 other employees, was terminated by the first respondent (the company) on ground of redundancy. The claims of the appellants in the Industrial Court were dismissed in Award No 811 (Au Lai Chan), Award No 812 (Wong Meng Koon) and Award No 813 (Lim Chwee Hoon). Although the claims were heard together in the Industrial Court, three separate grounds of decision were

issued. At the High Court, the judicial review applications of Au Lai Chan (JR 263) and Lim Chwee Hoon (JR 264) were consolidated. The judicial review application of Wong Meng Koon (JR 265) was not similarly consolidated but all three applications were heard together. The learned High Court judge issued a single judgment in which he dismissed all three judicial review applications. Since the appeals are related, similar to the Industrial Court and the High Court, we heard the them together. Hence, we shall issue only one judgment to state the reasons for our decision.

THE CASE OF AU LAI CHAN

[3] The first respondent company is in the business of manufacturing and distributing ceramic and porcelain tiles and accessories. In 2018, it terminated the services of more than 20 employees, including that of the appellants, citing redundancy as the cause. The termination letter to the employees listed three reasons:

(a) downward trend in the market;

(b) cost pressures; and

(c) continued poor yields of the manufacturing operations which saw the yield of 91.8% in 2015 deteriorate to 88.2% in July of 2018.

The alleged redundancy stemmed from a decrease in the company's profits and its decision to downsize its manufacturing operations by shutting down Plant No 2 in Kluang, which employed 501 workers — more than half of its production workforce. The ensuing reorganisation at the company's office led to the retrenchment of 20 staff, including the appellants, with the aim of improving effectiveness and efficiency.

[4] Au Lai Chan joined the first respondent as Human Resource Executive on 1 March 1996. At the time of dismissal on 10 October 2018, she held the position of Senior General Manager (Manufacturing and Operational Support). She told the Industrial Court that in her last post, she was in charge of operations of three plants in Kluang, Johore. Her other duties allegedly included overseeing the maintenance of the company's buildings in Johore and its headquarters building in Petaling Jaya. She attended weekly sales management meetings and was tasked with analysing the performance of the company's monthly sales and the performance of the sales staff. Her last drawn monthly salary was RM44,151. She was offered a severance package of RM380,002.30, which she accepted.

[5] In the Industrial Court, Au Lai Chan argued that the company did not incur a loss in profits. Even if it did, she contended the losses the company suffered did not justify her dismissal. She believed that these losses were

primarily a result of the closure of Plant No 2 in November of 2018, which, in her opinion, was a poor decision. She also asserted that her job functions did not cease to exist but were taken over by the Chief Operating Officer (COO), one Dickson Yong, to whom she had previously reported, as well as by other officers. She was not offered another position such as her previous position as the Human Resource Manager. For these reasons, Au Lai Chan alleged bad faith against the company.

[6] The company argued its case as follows. Au Lai Chan's main job function was only to act as a liaison between the COO and its three plants in respect of production and administrative matters. While she held responsibility for general administration, her job scope was limited to sales and customer relations. Following the reorganisation, after the closure of Plant No 2 in Kluang and the downsizing of the workforce in both the plants and the head office, the job functions of the Au Lai Chan were assumed by the COO who was in charge of day to day operations. The company no longer needed a senior officer such as the Au Lai Chan to oversee a significantly reduced manufacturing operation. In the circumstances, the position of Senior General Manager (Manufacturing and Operational Support) was not necessary and became redundant.

THE CASE OF LIM CHWEE HOON

[7] Lim Chwee Hoon commenced employment in Otentik Sdn Bhd in 1994 and was transferred to the first respondent company in 1998 as an Administration Supervisor. At the time of dismissal, she held the position of Administration Executive with a monthly salary of RM8,105. She was dismissed on 10 October 2018 for similar reasons as Au Lai Chan, ie the downward trend in the market, problem with yields and the closure of Plant No 2 in Kluang.

[8] Lim Chwee Hoon's complaint was similar to that of Au Lai Chan. The company was not in financial difficulty and the job functions continued to exist but were redistributed to other employees, including one of her juniors. Therefore, there was no redundancy that justified her dismissal.

[9] Lim Chwee Hoon's responsibilities included managing all travel itineraries, booking flights and hotels for the COO and senior management staff of the Company, handling confidential matters for the COO and collaborating with the Senior General Manager (Manufacturing and Operational Support) on administrative matters at the Petaling Jaya Office. The company argued that following the downsizing of its operations and subsequent reorganisation, Lim Chwee Hoon's duties were decentralised to the respective departments, rendering her surplus to the company's workforce.

THE CASE OF WONG MENG KOON

[10] Wong Meng Koon joined the company as an Export Executive in 1997. At the time of dismissal, he held the position of General Manager (Commercial) with a monthly salary of RM22,941. The letter terminating his employment stated the same reasons as in the case of the other two claimants, ie redundancy caused by downward trend in the market, problem with the yields and the closure of one of its plants. Wong Meng Koon's complaint was similar too. He said that there was no redundancy because his job functions continued to exist but the company redistributed them to other employees. He said that prior to being dismissed, he was at one time identified to succeed the Commercial Director.

[11] The company's arguments for denying Wong Meng Koon's claim are similar to those made out for denying the claims of Au Lai Chan and Lim Chwee Hoon. The company was operating at a loss and, as a result, had to downsize by closing Plant No 2. Following this, a comprehensive review of all departments and the roles of all employees, from senior management to administrative positions, was conducted to identify any positions that were surplus to the company's manpower requirement.

[12] The company said that Wong Meng Koon's job functions were to assist the Commercial Director in executing sales plans and tactics to ensure that the export and project departments achieved sales targets and profit margins. Furthermore, he was tasked with liaising with the Production Department, Marketing and Original Equipment Manufacturers as well as customers on various product related matters. Pursuant to the reorganisation, Wong Meng Koon's job functions were absorbed by his superior and his position ceased to exist. No new employee was hired to replace Wong Meng Koon.

FINDINGS OF THE INDUSTRIAL COURT

[13] In the Industrial Court, the learned Chairman found that a genuine redundancy arose in the company because of the downsizing and reorganisation that was necessitated by the losses suffered by the company from the year 2017 onwards. He accepted the evidence of COW1, who was the Hap Seng Group Human Resource Director, and the evidence of COW2, who was the company's general manager for finance. COW1 testified based on the company's financial statements and audited accounts, its profits had dropped from RM23.7m in 2015 to negative RM20.7m at the end of 2018. COW2 testified that the production yield declined during the same period. The Chairman also found that there was undisputed evidence that Plant No 2 was running at a loss and it was the prerogative of the management to close it. She did not find evidence of ulterior motive on the part of the company in closing

the plant that employed 501 workers. Consequently, she found that the position of Au Lai Chan became redundant due to downsizing and reorganisation. She also found the fact that Au Lai Chan's job functions ceased to exist and were absorbed by the COO was not necessarily indicative of bad faith. Thus, Au Lai Chan's claim was dismissed.

[14] In respect of the claims of Lim Chwee Hoon and Wong Meng Koon, the learned Chairman gave similar reasons for dismissing them. She found that due to the downsizing of operations because of market conditions and loss of profits and the ensuing reorganising of the workforce, their positions had become surplus to the manpower requirement of the company and had become redundant. She also found that the company did not have a collateral purpose or ulterior motive for dismissing Lim Chwee Hoon and Wong Meng Koon. No new employees replaced them. Their functions were redistributed merely on account of downsizing and reorganisation and for no other reason. Thus, there was no evidence of bad faith.

DECISION OF THE HIGH COURT

[15] The learned High Court judge affirmed the decision of the Industrial Court and adopted its reasoning. His Lordship found that a genuine redundancy existed. The scale of the manufacturing operations was drastically reduced. Therefore, Au Lai Chan's role as Senior General Manager was no longer an integral part of the company's operations. The High Court also had regard to the finding of fact of the Industrial Court that the audited accounts gave a true indication of the company's financial status. It suffered losses due to market downtrend since 2017. In 2018 it suffered losses of RM129m. The High Court agreed with the Industrial Court that the profit guarantee given by the former owner (Gek Poh Holdings) of the company to the new owner (Hap Seng Group) was not relevant. The guarantee would only benefit the new owner, Hap Seng Group, and would not contribute to the profits of the company in question. Finally, the High Court accepted the finding of fact by the Industrial Court that there was no bad faith on the part of the company when it dismissed Au Lai Chan. No new employee was hired to replace her; instead her job functions were merely redistributed.

[16] The learned High Court judge agreed with the Industrial Court in respect of the claim of Lim Chwee Hoon. His Lordship affirmed the finding of redundancy for the same reasons. In respect of the claim of Wong Meng Koon as well, the High Court reached the same conclusion in affirming the decision of the Industrial Court.

ISSUES IN THE APPEAL

[17] It was not disputed that the burden to prove redundancy lay with the company as the employer. Counsel for the appellants argued even if the reasons given in the termination letter were proven, it would not be sufficient. The company must prove that the appellants' positions were genuinely redundant. Counsel for the appellants contended that redistribution of the workload of the appellants and reorganisation alone would not suffice to establish real redundancy. Additionally, the company has to prove that it adopted a fair procedure and offered alternative employment to the dismissed employee.

Whether reasons in termination letter proven?

[18] We shall first consider the finding by the Industrial Court and the High Court that the company had proved the reasons given in the termination letter before moving on to address the issue of redundancy in respect of each of the appellants.

[19] In our view, the finding of fact by the Industrial Court that that there was a downward trend in the market, problem with the yields and the resultant closure of one of its plants which was affirmed by the High Court, does not warrant interference by this court. The company was in the business of manufacturing and distributing ceramic and porcelain tiles and accessories. The crucial witnesses for the company were COW1, who was the Hap Seng Group Human Resource Director and the COW2, who was the company's general manager for finance. They testified that the market moved towards cheaper glazed porcelain. Both COW1 and COW2 testified about the loss of profits from the year 2017 onwards as well as lower production yield as we said earlier. Their evidence was mainly based on the financial statements and the audited accounts. The learned Chairman of the Industrial Court addressed the evidence as follows:

> [61] COW2 confirmed that the deterioration of profits where he clarified that COB4 p 5 shows a yield decline from 91% to 88% in 2015 and 2018 and confirm that in the year 2018, the company's losses were 129 million.
>
> [62] The court is satisfied that both COW1 and COW2 provided a clear and consistent evidence of the company's losses and financial status making reference to COB1 p 1–83 the audited financial statement of 2018 and the production yield analysis from the year 2015–2018 (COB4 p 5).
>
> [63] The court is of the view that the audited accounts are a true indication of the financial status of the company; which clearly showed that the company incurred losses since 2017. There is no reason for the court to doubt the contentment of those documents.
>
> [64] It was also evidence in the court that the company's deterioration of profits was

also public knowledge where in an article published in the STAR tendered as evidence by the claimant as reflected in CLB1 p 53, which reads as follows:

> according to the group's filing to the stock exchange, Gek Poh Holdings Sdn Bhd is obliged to pay a profit shortfall of RM175.31mil to Hap Seng under the terms of the share sale agreement for the latter's acquisition of Malaysian Mosaics Sdn Bhd in 2016.

[20] In fact, the company also tendered evidence of a WhatsApp conversation that Au Lai Chan had with her superior (Dickson Poon) about the losses of the company and this evidence was considered by the learned Chairman. Thus, she concluded as follows:

> [70] It is the court's finding that there is nothing to doubt about the content of the audited financial statement of 2018 (COB1 pp 1–83), production yield analysis from the year 2015–2018 (COB4 p 5), the claimant's *Whatapps* conversation with her superior (CLB1 p 53) which all shows that the company was going through financial difficulties. The fact that the company was not performing and that there were poor yields of the manufacturing operations, this situation had contributed to the deterioration of the profits. The claimant's contention that the company was not in any financial difficulty is therefore unsubstantiated.

[21] We are of the opinion that the finding of fact of the Industrial Court based on the financial statements and audited accounts is unassailable. The authenticity of these crucial documents, which must by law be signed off by the directors, was not impugned. As against the above evidence of continued decline in the profits of the company since 2017, Au Lai Chan only pointed to the profit guarantee given by the former owner of the company (Gek Poh Holdings) to the new owner (Hap Seng Group). She further argued that the shutting down of Plant No 2 was not justified. In our opinion, the High Court rightly concluded that the profit guarantee is not pertinent in determining the profitability of the company. It is merely a profit guarantee by the former owner to the new one and nothing more. Therefore, no evidence was provided by Au Lai Chan in the Industrial Court to support her argument that the profit loss stated in the financial statements and the audited accounts were mere 'paper losses'. In the result, the evidence of the company in respect of profits remained unrebutted.

Redundancy

[22] Counsel for the appellant submitted that declining profits and reorganisation of the company alone are insufficient to dismiss an employee. The employer must prove actual redundancy. Counsel for the appellant cited a number of authorities to support the above proposition. In *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361, the Court of Appeal said as follows:

> It is our view that merely to show evidence of a reorganisation in the appellant is

A certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal, his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant.

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[23] Counsel for the appellant cited other authorities to argue that declining profits and workforce reorganisation, where job functions were assumed by other employees, are insufficient to prove redundancy. All these cases C referenced the *Bayer* case to support the principle that reorganisation alone is not an adequate criterion for proving redundancy. The cases are the unreported High Court case of *Saw Kong Beng v Mahkamah Perusahaan Malaysia & Anor* [2016] MLJU 1222, the Industrial Court case of *Wong Mei Yoke v Tien Wah Press (Malaya) Sdn Bhd* [2018] 1 ILR 20 and the Federal Court case of D *Dynacraft Industries Sdn Bhd v Kamaruddin bin Kana Mohd Sharif & Ors* [2012] 6 MLJ 453; [2012] 9 CLJ 21.

[24] Counsel for the respondent did not dispute the argument that a mere E decline in profits and workforce reorganisation, including distribution of job junctions to other employees, are alone insufficient to prove redundancy. However, on the facts of the instant case, he submitted that a genuine redundancy arose due to the major downsizing in operations. In support, he cited the Court of Appeal case of *Woo Vain Chan v Malayawata Steel Bhd* F *(currently known as Ann Joo Steel Bhd)* [2016] 2 MLJ 848; [2016] 10 CLJ 176. In that case, the Court of Appeal restored the decision of the Industrial Court which ruled that the employer failed to prove redundancy. The Court of Appeal noted that the High Court did not allude to any evidence to justify interference with the finding of fact of the Industrial Court. However, the Court of Appeal G approved the following passage from the High Court case of *Stephen Bong v FCB (M) Sdn Bhd & Anor* [1999] 3 MLJ 411:

> It is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind. The Industrial Court was right when it held that the applicant was H redundant as there was reduced work and reduced business within the company which made the applicant's position as an executive director in charge of one of the groups redundant.

[25] Our reading of the cases cited by both parties is that the finding of I redundancy is very much a fact-sensitive exercise. Therefore, a conclusion in one case, where issues such as declining profits and company reorganisation, including redistribution of remaining job functions, were deemed insufficient to make a finding of redundancy, cannot be applied to another case without thorough examination of all the relevant facts.

[26] For that reason, we do not find that the cases cited by counsel for the appellant are of assistance. In the *Bayer* case, the job functions of the employee were redistributed after reorganisation. However, apart from redundancy, the employer also gave another reason for dismissing the employee, ie it expected to suffer a loss of RM1m. But it failed to prove loss of profits and it also failed to prove that the workload of the dismissed employee had been reduced.

[27] In *Saw Kong Beng v Mahkamah Perusahaan Malaysia & Anor*, the employee's position disappeared following a reorganisation on the leadership chart. However, all of his functions continued to exist, with 70% of them assigned to a recently hired employee. As for loss of profits, the company failed to point out that the one quarter drop in revenue in the second quarter of 2009 was only a temporary setback. In fact, if the fourth quarter increase in revenue in 2009 was taken into account, the company would have shown a profit for that year.

[28] In *Wong Mei Yoke v Tien Wah Press (Malaya) Sdn Bhd*, the company's restructuring, cited as a reason for dismissal, did not result from profit loss, reduced production, or closure of any part its business. On the contrary, the restructuring occurred after the holding company had expanded its operations. Furthermore, all of the functions performed by the dismissed employee continued to exist. This was the basis for the Industrial Court's finding that the company failed to prove redundancy.

[29] Similarly, in *Dynacraft Industries Sdn Bhd v Kamaruddin Kana Mohd Sharif & Ors*, the facts and issues were different. It revolved around the application of the 'last in, first out' ('LIFO') principle which mandates the retrenchment of the most junior employee before more senior ones in the same category. There is no evidence in this case that someone who is more junior in the same category was retained in preference over the appellants.

[30] We shall now turn to the case of Au Lai Chan to consider whether the reorganisation was done because of scaling down of operations or for a collateral purpose. The evidence of COW1 was that Au Lai Chan had oversight of manufacturing operations and acted as a liaison between the manufacturing plants in Kluang and the top management. However, when Plant No 2 was closed, the company did not need such a senior person to oversee a very much reduced manufacturing operation and to liaise with the top management. The evidence that Plant No 2 was the major plant with the largest number of employees was undisputed. It employed 501 workers. In contrast, only 60 and 300 workers were employed in Plants No 1 and No 3 respectively. Au Lai Chan herself agreed during cross-examination in the Industrial Court that Plant No 2 contributed more than 50% of the total production capacity of the company. It was for this reason that the learned Chairman of the Industrial Court made

A the following finding of fact:

> [82] With the closure of Plant 2 and with the reduced manufacturing operations functions, it is obvious that the Company no longer need such a senior person to oversee a very much reduced manufacturing operation. As such, it is obvious the Claimant's position is a surplus to the Company's requirement.
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> [83] COW1's evidence that the management identified the Claimant's position as surplus because COO who was in charge of the Company's overall day to day running will liaise directly with the Heads of Plants in relation to the manufacturing and operations of the Company was not challenged. As such the reorganisation of the Company's workforce that ceased the Claimant's position as Senior General
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C Manager-Manufacturing and Operational Support was a bona fide exercise.

[31] The learned Chairman did consider Au Lai Chan's argument that she performed a variety of other duties beyond acting as liaison between the
D manufacturing plants and top management. However, she found that Au Lai Chan failed to prove that claim by documentary evidence. As a result, the learned Chairman determined that her primary role was indeed as a liaison, and that this job function became redundant due to significant reduction in manufacturing. Consequently, her job function could be taken over by the
E COO. The finding is found in the following paragraphs:

> [86] With no evidence to support her contentions, the Court have no reason not to believe COW1's explanation that the Claimant's role in the Company was as a liaison between the COO and the Heads of Plants to only oversees the manufacturing operations in Kluang plants.
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> [87] COW1's explanation cannot be his assumption about the Claimant's role in the Company because the Claimant's superior who was also the COO of the Company was made to absorbed the Claimant's functions. The COO would not be able to easily absorbed the Claimant's job functions if the Claimant's job functions comes heavy responsibilities.
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G
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> [88] The Claimant admitted that she reports to the COO, take instructions from COO, and obtain approval from him too. No evidence adduced before this court to show that the COO or the Company doesn't know anything about the plants activities without the Claimant's involvement. As the COO was easily made to absorbed the Claimant's job function, the Claimant's position was indeed
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H redundant due to the reorganisation exercise and she is indeed a surplus to the Company's requirement.

[32] We have no reason to interfere with the finding of facts by the Industrial Court in respect of Au Lai Chan's redundancy. We reiterate that mere
I restructuring or reorganisation and decline in profits cannot be the sole ground to support the argument of an employer that a particular job function or position has become redundant. However, the cases cited by counsel for Au Lai Chan must be distinguished as we said earlier. In the instant case, apart from continuous decline in profits for various reasons and the ensuing reorganisation

of the company, manufacturing operations from the plants were reduced by 50%. As for the issue whether the decision to close Plant No 2 was a correct decision, it is one that requires business judgment and it is not for the court to usurp that function unless there is evidence of bad faith. In this context we would endorse the view of the learned Industrial Court Chairman in the case of *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535; [1997] 1 LNS 99 which was approved by Abdul Kadir Sulaiman J in the High Court. It is as follows:

> It must be brought to the attention of all parties that the right to reorganise the company is the prerogative of the management to achieve maximum efficiency and effectiveness and to avoid any kind of duplicity of work in the company.

[33] Of course, we hasten to add that, in bad faith cases, it is possible to view the shutdown of a small operation as a colourable exercise of management prerogative to deliberately eliminate some employees. However, in the instant case, considering the size of the plant that was closed down and the proven reasons such as declining profits due to market conditions and poor yields, the managerial decision cannot be viewed with suspicion. The learned Chairman made the following finding in this regard and we wholly agree with it:

> [108] In the present case, due to the downward trend of the market to cheaper products, significant cost pressures, increase in raw material costs, and the continued poor yields of the manufacturing operations causing the Company's yield to deteriorate leading to the closure of Plant 2, the Company rightfully reorganise its structure for economic purposes to sustain the business. There was surplus of the work including the works the Claimant was performing and obviously the Company requires fewer employees. Under these circumstances, the Claimant's position was excess to the requirements the Company, therefore the Company is entitled to discharge such excess.

[34] We shall now consider the issue of redundancy in relation to Lim Chwee Hoon who was an Administrative Executive/Secretary. As we said earlier, her job functions included managing all travel itineraries, flight and hotel bookings of the senior management staff of the Company, managing confidential matters for the COO and also working with the Senior General Manager (Manufacturing and Operational Support) on administrative matters at the Petaling Jaya Office. The company's reasons for her dismissal were the same as those of the other appellants. Because of the major downsizing of operations and the ensuing reorganisation of the workforce, her job functions were decentralised to the respective departments. Lim Chwee Hoon claimed before the Industrial Court that all her functions were redistributed to another employee. She also claimed to have performed administrative and human resource functions.

[35] The learned Chairman found that Lim Chwee Hoon failed to prove

A that she performed administrative duties as well and that all her job functions were given to another employee in the following passages:

> [43] The claimant however when asked to show proof of her job function that she claimed performing, she was unable to substantiate her claim about her duties and responsibilities she listed in her Witness Statement Q&A4, which she claimed she performed prior to her dismissal.
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> [44] The claimant too could not show any evidence to support her contention that one Salina binti Che Leh Salleh, whom the claimant alleged was her junior in service took over her job function.

[36] We reiterate here that given the major downsizing of its operations that cannot be disputed, the company had a right to reorganise its work force for economic efficiency. Therefore, the act of decentralising the job functions of the Lim Chwee Hoon and deeming her position as surplus cannot be criticised. For that reason, we agree with the following finding of the learned Chairman that was approved by the High Court:

> [46] The Claimant was indeed surplus to the Company's work force requirements as there was no longer any requirement for an Administration Executive cum Secretary for the Company due to the decentralised to the respective departments.
>
> [47] The Company has the right to determine the volume of its staff consistent with its business and it can reorganise its business in any manner it think fit for the purpose of economy and better management.

[37] As for Wong Meng Koon, he was dismissed for similar reasons as Au Lai Chan and Lim Chwee Hoon. Due to the reorganisation, his job functions were absorbed by his superior and it bears repeating that no new employee was hired to take over them. At the trial in the Industrial Court, Wong Meng Koon did not dispute that the company was losing money and therefore the decision was made to close Plant No 2. The Industrial Court found that there was no bad faith in removing the position held by Wong Meng Koon as the company was downsizing its operations and that it was entitled to discharge excess workforce. It found as follows:

> [64] The court is satisfied that the reasons in the dismissal letter were not a manipulative act on part of the company to victimise the claimant. The company exercised its managerial powers bona fide and the claimant's termination was with just cause or excuse.
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> [65] Given this facts, the court is satisfied that the reorganisation by the company was a bona fide exercise of its managerial prerogative to run the business operations as it deemed fit in order to successfully continue the company's overall business operations.

[38] Prior to his dismissal, Wong Meng Koon was in charge of sales and, due

to the reduced operations, his job functions were absorbed by the Commercial Director who was his superior. We would again emphasise that employers cannot prove redundancy by merely removing the position of an employee from the organisation chart. However, in the instant case, because of the substantially reduced manufacturing operations, we are of the view that the company was justified in transferring Wong Meng Koon's job function to his superior for 'the purpose of economy and better management' as found by the Industrial Court.

Fair procedure and alternative employment

[39] Au Lai Chan and Lim Chwee Hoon also argued that the company should have looked for alternative employment for them within the company and that it did not act fairly. However, the Industrial Court found that they failed to identify the existence of suitable positions and that, in any event, returning to previous positions would amount to demotion, as conceded by them. Furthermore, their counsel failed to point out any principle of law that states that once redundancy is proved due to a valid restructuring or reorganisation, the employer is still obligated to look for alternative employment for the retrenched employee. On the contrary, in the case *Nordson (M) Sdn Bhd v Lee Chin Tao & Anor* [2012] 4 MLJ 565, where the employee was retrenched due to redundancy, the Court of Appeal, speaking through Aziah Ali JCA said as follows:

> [14] The first respondent further complains that the appellant had failed to make any reasonable effort to look for alternative employment before retrenching him (para. 22 of the first respondent's statement of case at p. 78 of appeal record). We refer to the judgment of Abdul Kadir Sulaiman J (as he then was) in *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535; [1997] 1 LNS 99, as follows:
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> > The company after all was not obliged to make any offer for any alternative employment on account of the exercise properly carried out. Further, it was not mala fide on the part of the respondent not to consult or discuss with the applicant its determination to reorganise its company.
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> We respectfully agree with His Lordship and adopt the same in respect of this case. We find there is no obligation on the appellant to offer or secure alternative employment for the first respondent on account of the restructuring exercise validly carried out.

[40] For the above reasons, we see no merit in the argument that the company should have have looked for alternative positions for the dismissed employees.

CONCLUSION

[41] For all the above reasons, see no merit in the appeals of Au Lai Chan, Lim Chwee Hoon and Wong Meng Koon. The findings of fact of the Industrial Court which were affirmed by the High Court in respect of the reasons given by company for their dismissal do not warrant interference by this court. We bear in mind that we should be slow in interfering with the finding of facts of the Industrial Court unless there are good reasons to do so as we are exercising review jurisdiction only. From the plain facts, due to loss of profits and changing market trend, the company clearly justified their management decision to downsize their operations. It resulted in the dismissal of over 20 office employees (excluding 501 workers in Plant No 2) including the appellants herein. We shall therefore dismiss both appeals. In respect of Appeal 200 we award agreed costs of RM10,000 and in respect of Appeal 201 we award agreed costs of RM5,000. which shall be subject to allocatur.

Appeal 200 dismissed with agreed costs of RM10,000 subject to allocatur; Appeal 201 dismissed with agreed costs of RM50,000 subject to allocatur.

Reported by Dzulqarnain Ab Fatar